Nos. 00-15925 & 00-17040

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAIR HOUSING OF MARIN,

Plaintiff-Appellee

v.

JACK COMBS dba WATERS EDGE APARTMENTS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEE

WILLIAM R. YEOMANS
Acting Assistant Attorney General

DENNIS J. DIMSEY
KEVIN RUSSELL
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 305-4584

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INTEREST OF THE UNITED STATES

This case concerns the standing of a fair housing organization to file suit on its own behalf under the Fair Housing Act, 42 U.S.C. 3601 *et seq*. The Act provides for enforcement actions by the Attorney General as well as by private parties. See 42 U.S.C. 3613-3614. Private litigation under the Fair Housing Act by such organizations provides an important supplement to government enforcement under the Act. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972); 42 U.S.C. 3616a (authorizing the Secretary of Housing and Urban Development to contract with private, non-profit fair housing organizations to conduct testing, complaint investigation, and enforcement litigation under the Act).

This Circuit has not previously discussed the standing of fair housing organizations under the Fair Housing Act. The United States has an interest in ensuring the availability of such private enforcement actions, consistent with the statute and the Constitution.

ISSUE PRESENTED

This amicus brief is limited to addressing whether the district court's factual findings support its legal conclusion that Plaintiff, a non-profit fair housing organization, had standing to bring this Fair Housing Act suit alleging racial discrimination in renting apartments.

STATEMENT OF THE FACTS

Defendant Combs owned and managed the Waters Edge Apartments in Marin County, California (Order, J.A. 283). In February 1994, Plaintiff Fair Housing of Marin (FHOM), a non-profit fair housing organization, received a number of complaints that Combs was pressuring African American tenants in the complex to move out (Order, J.A. 283). In response, FHOM sent testers to inquire about renting an apartment at the complex. Combs encouraged both white testers to rent the apartment. He told one white tester that the complex was "all-white" and that he no longer rented to blacks (Order, J.A. 283). He told the other white tester that if she moved in immediately, he would waive the first month's rent (Order, J.A. 283). While he was polite to the African American testers, he did not encourage them to apply (Order, J.A. 283). Subsequently, FHOM received three other complaints of racial discrimination from tenants at Waters Edge, including

one from an African American tenant who alleged that Combs was trying to evict her because she was African American (Order, J.A. 283). After this tenant left the building, the complex was all-white and remained so for the next three years until Combs sold the complex during the pendency of this litigation (Order, J.A. 283). While he owned the complex, Combs repeatedly told residents that he wanted only white tenants and would not rent to African Americans (see Order, J.A. 284 (Combs told white tenants "I don't want any niggers in my building. I own it. I'll have who I want"; "I'll sell the place before I rent to a nigger"; and "No niggers are allowed on the premises.")).

In 1997, FHOM filed a complaint in the United States District Court for the Northern District of California alleging that Combs had violated the Fair Housing Act, 42 U.S.C. 3604 (J.A. 1).[1] FHOM was the only plaintiff. Defendant moved to dismiss the complaint for lack of standing. The district court denied the motion (Order, J.A. 15-22), relying primarily on the Supreme Court's decision in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982). The court concluded (Order, J.A. 20) that FHOM had adequately alleged an injury-in-fact to itself through allegations substantially identical to those approved in *Havens*.

Defendant then proceeded to engage in a series of discovery abuses leading to warnings, monetary sanctions and, ultimately, the striking of his answer pursuant to Fed. R. Civ. P. 37(b)(2)(C) (see Order, J.A. 120-130). The court then held a

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[1] Plaintiff also alleged violation of the Civil Rights Act of 1866, 42 U.S.C. 1982.

hearing (J.A. 268-281) on Plaintiff's motion for a default judgment, and took evidence to establish the amount of damages. Afterwards, taking the facts alleged in the complaint as true,[2] the court concluded Combs had engaged in intentional racial discrimination in violation of the Act (Order, J.A. 282-285). The court then awarded $24,377 in compensatory damages to FHOM (based on the money FHOM diverted from its other programs to pursue the litigation and the cost of educational efforts to counteract Combs' discrimination) and $74,400 in punitive damages (calculated to deprive Combs of the rental income he received from two apartments from which he had evicted African American tenants) (see Order, J.A. 286-291). Finally, the court required Defendant to report to FHOM annually and disclose whether he owned or managed any rental properties (Order, J.A. 290).

Defendant appealed the judgment (J.A. 313). Subsequently, the district court awarded attorney's fees (Order, J.A. 339), which award Defendant also appealed (J.A. 341).

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[2] See *Geddes* v. *United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977) ("The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true."). In this case, however, the court noted that the affidavits and testimony submitted to establish the amount of damages also substantiated the allegations in the complaint going to liability (see Order, J.A. 285 ("[W]hile direct evidence of racial animus is relatively rare, it is amply present on this record.")).

SUMMARY OF ARGUMENT

The district court's findings adequately support its legal conclusion that Plaintiff established standing under the Fair Housing Act and Article III. Plaintiff's complaint contained allegations essentially identical to those found sufficient to establish standing in *Havens* and the district court found that those allegations were substantiated at the hearing to establish damages after Defendant's default. Defendant argues that Plaintiff failed to prove that it suffered a cognizable injury because, as a matter of law, proof of a diversion of resources from Plaintiff's counseling and educational activities is not enough to establish standing. This is not the law. Although there are different views regarding whether diversion of resources from fair housing activities to investigation and litigation is enough to establish standing, courts of appeals uniformly agree that standing can be established by proof that the plaintiff organization expended resources on out-of-court activities designed to remedy the effects of a defendant's illegal discrimination. In this case, the district court found that Plaintiff had demonstrated that Defendant's conduct created a need for it to undertake such remedial, out-of-court measures. This finding is sufficient to establish standing.

ARGUMENT

THE DISTRICT COURT'S FINDINGS SUPPORT ITS LEGAL CONCLUSION THAT PLAINTIFF ESTABLISHED STANDING UNDER THE FAIR HOUSING ACT AND ARTICLE III

The district court's factual findings in this case amply support the legal conclusion that Plaintiff established standing to pursue this action.

1. The Fair Housing Act specifically contemplates enforcement suits by non-profit fair housing organizations such as FHOM. The statute authorizes a civil action by "[a]n aggrieved person," 42 U.S.C. 3613(a); defines an "aggrieved person" as "any person who * * * claims to have been injured by a discriminatory housing practice," 42 U.S.C. 3602(i)(1); and defines a "person" to include "associations" and "unincorporated organizations," 42 U.S.C. 3602(d). The Act also authorizes the Secretary of Housing and Urban Development to "use funds made available under [the Fair Housing Initiatives Program] to conduct, through contracts with private nonprofit fair housing enforcement organizations, a range of investigative and enforcement activities designed to * * * carry out testing * * * [and] discover and remedy discrimination * * * ." 42 U.S.C. 3616a(b)(2). The Supreme Court has previously recognized that such "private attorneys general" suits play "an important role in this part of the Civil Rights Act of 1968." *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

As a result, the Supreme Court has concluded that Congress intended for fair housing organizations to be afforded the broadest possible standing, consistent with

the constitutional limitations of Article III. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982) (holding that "Congress intended standing * * * to extend to the full limits of Art. III and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section") (internal quotation marks and citation omitted). That is, "the only requirement for standing to sue * * * is the Art. III requirement of injury in fact." *Id*. at 376.

This injury in fact requirement is satisfied when a plaintiff has suffered a concrete injury in fact that is fairly traceable to the defendant's conduct and likely to be redressed by a favorable decision. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In *Havens Realty Corp.* v. *Coleman*, *supra*, the Supreme Court applied these long-standing principles to a lawsuit by a fair housing organization. That organization sent testers to investigate the allegedly discriminatory practices of a housing complex and, based on the findings of the investigation, brought suit. In its complaint, the organization alleged that

> Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices.

Havens, 455 U.S. at 379. The Supreme Court concluded that

> [i]f, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities--with the consequent drain on the organization's resources--constitutes far more than simply a setback to the organization's abstract social interests.

Ibid. (citations omitted). The Court noted that while these broad allegations were sufficient to withstand a motion to dismiss, they still must be proved at trial. *Id*. at 379 n.21.

2. To the extent Defendant is challenging the district court's denial of his motion to dismiss (see Br. 19-20), he is clearly wrong, as these allegation are essentially the same as those approved by the Supreme Court in *Havens*. Plaintiff in this case alleged:

> By reason of the defendant's unlawful acts and practices, FHOM has suffered injury to its ability to carry out its purposes and to serve the public in its effort to eliminate housing discrimination, to resolve fair housing disputes, to find and to make available decent rental housing to persons regardless of race or color, and to assure rights to the important social, professional, business, economic, and political benefits of association that arise from living in a community integrated with African Americans. The defendant's unlawful acts and practices have caused FHOM to suffer economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices.

Complaint ¶ 20, J.A. 5. Thus, in both this case and in *Havens*, the plaintiffs alleged that they diverted resources to identify and counteract defendant's illegal conduct. Compare *Havens*, 455 U.S. at 379 ("Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices") with Complaint ¶ 20, J.A. 5 ("The defendant's unlawful acts and practices have caused FHOM to suffer economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices"). And in both cases, the plaintiffs alleged that the defendant's conduct injured their ability to conduct their

fair housing activities. Compare *Havens*, 455 U.S. at 379 ("Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services.") with Complaint ¶ 20, J.A. 5 ("By reason of the defendant's unlawful acts and practices, FHOM has suffered injury to its ability to carry out its purposes").[3]

3. Even when a plaintiff's complaint alleges facts sufficient to establish standing at the pleading stage, "those facts (if controverted) must be supported adequately by the evidence adduced at trial." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). In this case, the default entered against Defendant prevented him from controverting any of the allegations in the complaint, except those going to the amount of damages. See *Geddes* v. *United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977) ("The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.") (citing *Pope* v. *United States*, 323 U.S. 1, 12 (1944)). See also *Thomson* v. *Wooster*, 114 U.S. 104, 111-114 (1885) (same); *Benny* v. *Pipes*, 799 F.2d 489, 495 (9th Cir. 1986) (same). The judgment, therefore, was issued based upon the pleadings and evidence submitted at the hearing held to establish the amount of damages. At that hearing, Defendant did not assert that Plaintiff was required to present additional evidence beyond its pleadings to substantiate its

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[3] At times Defendant seems to argue (Br. 20) that Plaintiff was required to specifically allege both that it had to divert resources from other activities *and* that this diversion impaired its activities. Whether or not both are required, Plaintiff clearly made both such allegations in this case.

standing allegations (see Transcript, J.A. 272; Order, J.A. 285). On appeal, however, Defendant appears to argue (Br. 19 & n.9, 23-29) that the standing allegations in the complaint, taken as true because of the default, cannot support standing absent additional factual proof.

There is some question whether the rules regarding default judgments can be applied to bar a defendant from contesting facts that go to the court's subject matter jurisdiction. Cf. *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (holding that well-pleaded facts going to personal jurisdiction may be taken as true as a discovery sanction, but distinguishing personal jurisdiction from subject matter jurisdiction). This issue, however, need not be resolved in this case. To the extent additional proof and factual findings regarding standing were required,[4] the district court made such findings in awarding damages and those findings are sufficient to support standing under *Havens*.

The district court awarded damages to Plaintiff under two headings. First, it awarded damages (Order, J.A. 285-287) tied to the cost of investigating Defendant's conduct and pursuing this litigation (which it labeled "diversion of resources"). Second, it awarded damages (Order, J.A. 287-288) for the cost of remedial efforts Plaintiff must undertake in the community to mitigate the damage

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[4] If the district court *could* properly assume the truth of the well-pleaded standing allegations, Defendant's standing challenge to the judgment would be no different than his meritless objection to the court's denial of his motion to dismiss. See pp. 7-9, *supra*.

done to its fair housing activities by Defendant's conduct (which it labeled "frustration of mission"). The court rejected Defendant's contention that there was no causal link between his conduct and any impairment of Plaintiff's activities or any need for remedial efforts (see Transcript of Hearing, J.A. 274-276; Order, J.A. 287-288).[5]

Defendant argues (Br. 25) that the damages awards are insufficient to demonstrate that Plaintiff suffered a cognizable injury because "merely reallocating resources from one program to another does not establish standing." For this proposition, he cites (Br. 20, 25) cases from the Third, Fifth, and D.C. Circuits, while noting that other courts have held otherwise.

Defendant mischaracterizes the holdings of the cases he relies upon and the nature of the disagreement among the courts of appeals. The cases Defendant points to do not dispute the general proposition that a diversion of resources can impair, or reflect an impairment of, an organization's activities. Instead, the cases Defendant relies upon concern a different issue:

> In deciding organizational standing questions after *Havens*, appellate courts have generally agreed that where an organization alleges * * * that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement. A number of our sister courts have, however, adopted different views of whether the injury necessary to establish standing flows automatically from the expenses associated with litigation.

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[5] Defendant argues (Br. 23-29) that this finding was clearly erroneous. The United States takes no position on this question.

Fair Hous. Council of Suburban Philadelphia v. *Montgomery Newspapers*, 141 F.3d 71, 78 (3d Cir. 1998) (citations omitted). The cases Defendant cites concern these latter disagreements over whether the cost of investigating the defendant's conduct or pursuing litigation to remedy the discrimination may, in itself, constitute an injury in fact sufficient to confer standing. Courts have expressed a variety of views on these questions, often with little discussion or analysis.[6]

But this Court need not confront these questions in this case because the district court found that Plaintiff suffered injuries beyond having to expend resources on investigation and litigation. In awarding damages for "frustration of

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[6] The Second, Third, Sixth, Seventh, Eighth, and Eleventh Circuits appear to permit standing based on the cost of pre-litigation testing and investigation. See *Ragin* v. *Harry Macklowe Real Estate*, 6 F.3d 898, 905 (2d Cir. 1993); *Alexander* v. *Riga*, 208 F.3d 419, 427 n.4 (3d Cir. 2000), cert. denied, 121 S. Ct. 757 (2001); *Fair Hous. Council of Suburban Philadelphia* v. *Montgomery Newspapers*, 141 F.3d 71, 78 (3d Cir. 1998); *Hooker* v. *Weathers*, 990 F.2d 913, 915 (6th Cir. 1993); *Village of Bellwood* v. *Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990); *Arkansas ACORN Fair Hous., Inc.* v. *Greystone Dev., Ltd.*, 160 F.3d 433, 434-435 (8th Cir. 1998); *Central Ala. Fair Hous. Ctr., Inc.* v. *Lowder Realty Co.,* 236 F.3d 629, 642 (11th Cir. 2000). The D.C. Circuit appears to reject this "cost of investigation" theory. See *Fair Employment Council of Greater Washington, Inc.* v. *BMC Marketing Corp.*, 28 F.3d 1268, 1276-1277 (D.C. Cir. 1994). The courts are more divided regarding whether the cost of litigation alone can provide a basis for standing. The cases Defendant cites from the Third, Fifth, and D.C. Circuits appear to reject the "cost of litigation" theory. See *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 79; *Association of Retarded Citizens* v. *Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994); *Fair Employment Council of Greater Washington, Inc.*, 28 F.3d at 1276-1277. See also *Central Ala. Fair Hous. Ctr.,* 236 F.3d at 642. On the other hand, the Second, Seventh, and Eighth Circuits appear to hold that the diversion of resources to litigation is sufficient to establish standing. See *Ragin*, 6 F.3d at 905; *Bellwood*, 895 F.2d at 1526; *Arkansas ACORN Fair Hous., Inc.*, 160 F.3d at 434-435.

mission," the district court agreed with Plaintiffs that "Combs' activities did harm to their organizational mission to 'ensure equal housing opportunity and to educate the community on the value of diversity in our neighborhoods'" (Order, J.A. 287). The court awarded damages relating to this injury in the form of damages to cover the cost of "the design, printing and dissemination of literature aimed at redressing the impact Combs' discrimination had on the Marin housing market" (Order, J.A. 288).

Courts of appeals uniformly agree that the need to expend resources for such out-of-court remedial activities is a sufficient "concrete and demonstrable injury to the organization's activities--with the consequent drain on the organization's resources," 455 U.S. at 379, to support standing under *Havens*. See *Central Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co., Inc.,* 236 F.3d 629 (11th Cir. 2000); *Louisiana ACORN Fair Hous.* v. *LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000), cert. denied, 69 U.S.L.W. 3269 (Mar. 5, 2001)*; Arkansas ACORN Fair Hous., Inc.* v. *Greystone Dev., Ltd.*, 160 F.3d 433, 434-435 (8th Cir. 1998); *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993); *Hooker* v. *Weathers*, 990 F.2d 913, 915 (6th Cir. 1993); *Spann* v. *Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990).

This proposition is accepted even in the Circuits Defendant incorrectly cites (Br. 21-23) as holding that a diversion of resources is insufficient to establish standing. See *Louisiana ACORN*, 211 F.3d at 305 ("[A]n organization could have standing if it had proven a drain on its resources resulting from counteracting the

effects of the defendant's actions."); *Spann*, 899 F.2d at 27 ("*Havens* makes clear, however, that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action."); *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 78 ("[A]ppellate courts have generally agreed that where an organization alleges * * * that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement."). Contrary to Defendant's assertions (Br. 25-26), these courts recognize that when an organization is faced with a choice between suffering further injury to its activities and expending resources to avert that harm, the costs of out-of-court remedial efforts are not "results [of the plaintiff's] own decisions," but rather results of the illegal acts of the defendant. See *Spann*, 899 F.2d at 27; *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 79.

Thus, in a related context, this Court has approved standing for an organization that diverted resources from its ordinary activities to respond to the illegal conduct of a defendant. In *El Rescate Legal Services, Inc.* v. *Executive Office of Immigration Review*, 959 F.2d 742 (9th Cir. 1991), this Court held that a legal services organization that represented clients in immigration hearings had standing to challenge the government's failure to provide competent interpreters in those proceedings. Relying on *Havens*, this Court concluded that "[t]he allegation that the [government's] policy frustrates [the plaintiff's] goals and requires the

organizations to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing." *Id*. at 748. In a similar case, this Court held that an organization had standing to challenge a court's failure to provide sign language interpreters for deaf jurors when, as a result of this failure, the organization spent its own resources to provide an interpreter for a deaf juror. See *Greater Los Angeles Council on Deafness, Inc.* v. *Zolin*, 812 F.2d 1103, 1106, 1115 (9th Cir. 1987).

As the courts have explained, causing a plaintiff organization to expend resources to counter the effects of illegal discrimination necessarily reduces the resources available to conduct its other activities, thereby creating an impairment of those activities. See, *e.g.*, *Central Ala. Fair Hous. Ctr.,* 236 F.3d at 642; *Ragin*, 6 F.3d at 905; *Village of Bellwood*, 895 F.2d at 1526.

Moreover, that such remedial activities are necessary in the first place demonstrates that the organization's activities have been impaired. As the district court recognized, "[t]o recover, a fair housing organization must establish that [the remedial] expenditures * * * are necessary to counterbalance the effects of a defendant's discriminatory practices." Order, J.A. 287 (quoting *Spann*, 899 F.2d at 28-29). Thus, damages for remedial efforts are predicated on the finding that the defendant's actions have caused an injury to the plaintiff's activities that is in need of a remedy. The cost of necessary remedial activities is both an additional harm to the organization (because it leaves the organization with fewer resources to expend on its other activities) and "another manifestation of the injury that those practices

had inflicted upon the organization's noneconomic interest in encouraging open housing." *Fair Employment Council of Greater Washington*, 28 F.3d at 1277 (internal quotation marks omitted). That is, the remedial activities are necessary because the defendant's illegal discrimination has injured the organization's activities by making its "overall task more difficult," "increas[ing] the number of people in need of counseling," or "reduc[ing] the effectiveness of any given level of outreach efforts." *Id*. at 1276.

Thus, it does not matter that Plaintiff in this case was not able to expend additional resources to remedy the harm to its activities caused by Defendant's conduct prior to being awarded the damages to cover this cost (see Order, J.A. 287-288). The award of damages was necessary only because Defendant's actions had already interfered with Plaintiff's ongoing efforts to assist tenants of all races in securing the housing of their choice (Order, J.A. 287). The award of damages to allow Plaintiff to undertake remedial action is a manifestation of the underlying injury to its activities.

CONCLUSION

This Court should conclude that the district court's factual findings support its conclusion that Plaintiff had standing to litigate this action.

Respectfully submitted,

WILLIAM R. YEOMANS
Acting Assistant Attorney General

_____
DENNIS J. DIMSEY
KEVIN RUSSELL
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 305-4584

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points, and contains 4090 words.

_____
KEVIN RUSSELL
Attorney

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for the United States as Amicus Curiae in Support of Appellee were sent by first class mail this 26th day of March, 2001, to the following counsel of record:

Michael K. Johnson, Esq.
Lewis, D'Amato, Brisbois & Bisgaard, LLP
One Sansome Street, Suite 1400
San Francisco, CA 94104-4431

D. Scott Chang, Esq.
26870 Moody Road
Los Altos Hills, CA 94022

Peter G. Lomhoff, Esq.
The Ordway Building
One Kaiser Plaza, Suite 1725
Oakland, CA 94612

Thomas V. Loran, III, Esq.
Craig E. Stewart
Kim Zeldin, Esq.
Pillsbury, Madison & Sutro
50 Fremont Street, 5th Floor
P.O. Box 7880
San Francisco, CA 94120-7880

_____
KEVIN RUSSELL
Attorney